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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT THE CURATORS OF THE UNIVERSITY OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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BRIEF OF RESPONDENT THE CURATORS OF THE UNIVERSITY OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Respondent The Curators of the University of Missouri, a public corporation of the State of Missouri, prays that the Court deny the petition for writ of certiorari filed by Marilyn Shapiro, petitioner, to review the decision of the Supreme Court of Missouri in the case of *Shapiro* v. *Columbia Union National Bank and Trust Company*, 576 S.W.2d 310 (Mo. en banc, 1978).

QUESTIONS PRESENTED

1. Is petitioner's case moot?
2. Does petitioner have standing to proceed in this Court?

3. Does petitioner's Second Amended Petition state a claim upon which relief can be granted?

4. Did the Supreme Court of Missouri err in concluding that the case does not involve "state action" under the Fourteenth Amendment or action under color of state law under 42 U.S.C. §1983?

REASONS FOR DENYING THE WRIT

Respondent Curators submits that petitioner's request for the issuance of a writ of certiorari should be denied for the following reasons:

1. Petitioner's claim is moot and petitioner lacks standing.

Petitioner's Second Amended Petition, dismissed by the trial court (A59), contained two counts: Count I sought money damages of $3900, presumably under 42 U.S.C. §1983, for the alleged deprivation of petitioner's constitutional rights. Count II sought a declaratory judgment that the denial to petitioner of benefits under the Victor Wilson trust was a denial of her constitutional rights and a ruling by the court that the trust should be revised by substituting "students" or "individuals" for "boys".

The Second Amended Petition was filed on September 25, 1974 (A55). On that date petitioner was no longer a student at the University of Missouri at Kansas City ("UMKC"), having graduated with a law degree in the spring of 1974. Thus the claim asserted in petitioner's Count II was moot from the outset, and is now moot, under the decisions of this Court, *DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 174 (1975); *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and petitioner lacks standing to prosecute said claim, *Craig* v. *Boren, supra.*

The Supreme Court of Missouri stated that "the claim may well be moot under Missouri cases" (A34, footnote 7). It nevertheless proceeded to decide the case, relying on somewhat suspect authority[1] for the proposition that under Missouri law mootness does not preclude a decision where the question is of great public importance and involves public rights or interests which may readily recur (A34). That is not the law as decided by this Court; mootness is fatal to a case of this nature when prosecuted individually and not as a class action, *Board of School Commissioners of Indianapolis* v. *Jacobs* and other authorities, *supra.* Cf. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

Furthermore, even if petitioner were still a student at UMKC, to have standing she would have to be able to show that she herself has suffered a distinct and palpable injury that is likely to be redressed if the requested relief is granted, *Gladstone, Realtors* v. *Village of Bellwood*, ... U.S. ....., 99 S.Ct. 1601, 1608 (1979). In the case at bar, that requires not only establishing that the Victor Wilson trust is unconstitutionally discriminatory but also that its benefits should have been extended to females and, specifically, to petitioner. As noted, in her petition petitioner prayed that "students" or "individuals" be sub-

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1. Two of the three Missouri cases cited by the Court, *Triplett* v. *Grundy Electric Cooperative, Inc.*, 389 S.W.2d 401 (Mo.App., 1965), and *Lawyers' Association of St. Louis* v. *City of St. Louis*, 294 S.W.2d 676 (Mo.App., 1956), make reference to the rule in question but state that in neither had the case actually become moot. The third case cited, *Western Auto Supply Company* v. *Banner*, 288 S.W.2d 402 (Mo.App., 1956), finds the rule inapplicable in that case.

stituted for "boys" in the will. She alleged no grounds whatsoever in support of that obviously inappropriate remedy, and the claim for that relief has probably been abandoned.[2] Yet unless petitioner can show that the alleged unconstitutionality resulted in an injury peculiar to her or to a distinct group of which she is a part, she has no standing as to either count of her petition, *Gladstone, Realtors, supra.*

2. Petitioner's Count I fails to state a claim upon which relief can be granted.

The Supreme Court of Missouri, proceeding as noted despite mootness, held that the petition failed to state a claim for relief because there was no state action involved within the meaning of the Fourteenth Amendment (A36-A47). It said that petitioner's claim under 42 U.S.C. §1983 failed for the same reason (A48). It did not reach the other defenses to petitioner's claim for damages under 42 U.S.C. §1983.

While we believe that the determination of no state action was correct, as discussed *infra*, petitioner's Count I was properly dismissed in the trial court for other reasons as well, all of which the trial court ruled on (A59).

The only defendants in this case against whom petitioner could conceivably be claiming damages are The Curators of the University of Missouri, a public corporation under the statutes and constitution of Missouri, and Columbia Union National Bank & Trust Company, the trustee

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2. The opinion of the Missouri Court of Appeals, printed in petitioner's Appendix (A1-A25), became in effect a nullity when the case was transferred to the Missouri Supreme Court, which then heard the case de novo as if on original appeal, Rule 83.09, Mo. R.C.P. Even the Court of Appeals, however, turned down petitioner's claim for reformation of the will as "too drastic" a remedy (A23).

of the Victor Wilson trust. Charles B. Ratchford, then President of the University of Missouri, and James C. Olsen, then Chancellor of UMKC, were named as defendants but were never actually made parties or served with process. The Attorney General of Missouri is a party only because of the charitable trust involved. The other defendants were Victor Wilson's known and unknown heirs. The claim against Ratchford, Olsen and Curators is based on *respondeat superior* (¶12 of Pet., A56), which will not support an award of damages under §1983, *Monell* v. *Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Respondent Curators is the state university, in its incorporated and body politic form, §172.020, Revised Statutes of Missouri, 1969; Missouri Constitution of 1945, Article IX, §9(a). As an arm of the state, respondent Curators is not subject to suit under 42 U.S.C. §1983, *Gay Lib* v. *The University of Missouri,* 416 F.Supp. 1350 (W.D. Mo., 1976), reversed on other grounds, 558 F.2d 848 (C.A. 8, 1977); *Prostrollo* v. *University of South Dakota,* 507 F.2d 775 (C.A. 8, 1974), cert. den. 421 U.S. 952, 95 S.Ct. 1687, 44 L.Ed.2d 106 (1973); *Sellers* v. *Regents of University of California,* 432 F.2d 493, 500 (C.A. 9, 1970). Said another way, respondent Curators is not a municipality or other local governmental unit whose prior immunity under §1983 was stripped by *Monell* v. *Department of Social Services of City of New York, supra.*

Further, were it not immune from suit under §1983, when faced with a claim for a compensatory award respondent Curators is entitled to the good faith defense enunciated in *Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). See *Handverger* v. *Harvill,* 479 F.2d 513 (C.A. 9, 1973).

Petitioner's claim for damages against the trustee was also properly dismissed by the trial court. The trustee has done no more and no less than carry out the terms of Victor Wilson's will, as it was bound to do under the governing law, *Coleman* v. *Lill*, 191 S.W.2d 1018, 1020 (Mo.App., 1945); *Rapp* v. *St. Louis Union Trust Co.*, 229 S.W. 1105, 1106 (Mo.App., 1921). The will mandated the selection of males as recipients of the trust benefits, and as discussed more fully *infra* the trustee's giving effect to the will's provisions was private action beyond the reach of 42 U.S.C. §1983. But even were it otherwise, the trustee, acting in unchallenged good faith under a valid will, should certainly not be liable in damages. See *Sebastian* v. *United States*, 531 F.2d 900 (C.A. 8, 1976), cert. den. 429 U.S. 856, 97 S.Ct. 153, 50 L.Ed.2d 133; *Welsh* v. *Kinchla*, 577 F.2d 767 (C.A. 1, 1978); *Duchesne* v. *Sugarman*, 566 F.2d 817, 829-30 (C.A. 2, 1977), extending the defense of good faith to private individuals and institutions in a §1983 action for damages.

Further, petitioner's action was dismissed in the trial court for the reason, *inter alia*, that her Second Amended Petition failed to conform to Missouri Rule of Civil Procedure 55.05, which requires a "short and plain statement of the facts showing that the pleader is entitled to relief . . ." While the point was not reached by the Supreme Court of Missouri, we submit that the petition here does not plead facts sufficient to show that petitioner, apart from her sex, met the qualifications of the will for trust benefits: i.e., that she was "financially unable to obtain a University education" and that she possessed "unusual ability or talent" (quoting the will, A2-A3), and that she would have been among the "one or more" persons meeting said qualifications whom, aside from considerations of sex, the trustee would have selected for financial aid.

Finally, petitioner's claim for damages is deficient for the same reason as her lack of standing, discussed above: i.e., petitioner has not and cannot establish that, even were the trust unconstitutionally discriminatory, she or a group of which she is a member has sustained damage. The basic purpose of a §1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights, *Carey* v. *Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). If the will is not to be reformed retroactively to include females as beneficiaries, then petitioner has no claim for compensatory relief; and reformation of the will under the *cy pres* doctrine is rather obviously not an appropriate remedy in this case.

3. The Supreme Court of Missouri correctly determined that the case does not involve state action within the meaning of the Fourteenth Amendment.

Petitioner's claim is that she was denied the right to apply for and receive benefits from the Victor Wilson trust solely because of her sex, under circumstances amounting to action under color of state law (42 U.S.C. §1983) and state action under the Fourteenth Amendment. The Supreme Court of Missouri concluded that the discrimination on the basis of sex involved here resulted from the testator's own personal predilection; that his private trustee had the final duty and authority to select and approve the applicants for trust benefits; and that the involvement of UMKC in disseminating information about the scholarships, receiving and processing applications, and nominating potential recipients was not of such significance that "state action" results (A45-A47). To the extent that the Missouri court interpreted the will and defined the respective roles of the trustee and the other parties involved, it was performing the essentially state-law function of will construction, *Evans* v. *Abney*, 396 U.S. 435, 444, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

As petitioner concedes (5), this case involves a "purely private choice" which the State of Missouri was "in no way responsible for", quoting *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 (1978), interpreting *Evans* v. *Abney, supra.* Petitioner, however, contends that because a 1964 court decree ordered that references to a private university in the decedent's will be construed to mean UMKC with respect to the use of trust income (A56), state action in the Fourteenth Amendment sense is now involved.

In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), this Court said that "our holdings indicate that where the impetus for discrimination is private, the State must have 'significantly involved itself with invidious discriminations'." *Moose Lodge* involved the refusal of a private lodge, licensed and regulated by the state, to serve a Negro guest. The Court said that the state regulation, however detailed it might be in some particulars, did not in any way foster or encourage racial discrimination. Hence the state was not sufficiently implicated in the lodge's discriminatory policies to make the latter "state action" under the Equal Protection Clause of the Fourteenth Amendment. 407 U.S. 177-78.

In *Flagg Bros., Inc.* v. *Brooks, supra,* this Court stated that the action of a private person can give rise to a deprivation of a Fourteenth Amendment interest only if the action of the private person "may fairly be treated as that of the State itself", 98 S.Ct. 1734. The mere acquiescence of the state in a private action has never been held to convert the private action into state action, 98 S.Ct. 1737.

The reasoning of this Court in the above-cited cases supports the conclusion reached here by the Missouri Supreme Court. The decision to establish a scholarship fund

for boys was made by Victor Wilson when he executed his will. It became irrevocable when he died in 1948. Neither UMKC nor any other arm or agency of the State of Missouri can compel the trustee to violate the terms of the will. It is immaterial that UMKC assists in preliminary, nondiscretionary processes relative to trust applicants. The questions of law are whether or not it can be said that the state fosters and is significantly involved in the discrimination of which petitioner complains (*Moose Lodge*), and whether or not the decisions of the bank as trustee, reflecting in turn the testator's private choice, may fairly be treated as action of the state itself (*Flagg Bros.*). The answers to these questions are clear: UMKC had no involvement with and neither fosters nor discourages the limitation of trust benefits to males. The action of the testator and his trustee in making scholarship funds available to males and not females can in no sense be treated as action of the state. Therefore, we submit, the Supreme Court of Missouri correctly held that there was no state action involved under the Fourteenth Amendment and no claim for relief stated under 42 U.S.C. §1983.

CONCLUSION

For the reasons set forth above, Respondent Curators requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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